EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/50 Employment status in discrimination claims: absence of obligations between assignments can be relevant (UK)

<p>The Court of Appeal has given guidance on how to determine employment status in discrimination cases where the claimant is engaged on a case-by-case basis. The judgment confirms that the lack of mutual obligations between the putative employer and employee between assignments can be a relevant factor. If an individual is engaged on an assignment-by-assignment basis, with the freedom to turn down work when it is offered, this may imply a lack of subordination during the periods of work. The absence of an overarching 'umbrella' contract between assignments may therefore be relevant when determining whether an individual is protected by discrimination law.</p>

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The Court of Appeal has given guidance on how to determine employment status in discrimination cases where the claimant is engaged on a case-by-case basis. The judgment confirms that the lack of mutual obligations between the putative employer and employee between assignments can be a relevant factor. If an individual is engaged on an assignment-by-assignment basis, with the freedom to turn down work when it is offered, this may imply a lack of subordination during the periods of work. The absence of an overarching 'umbrella' contract between assignments may therefore be relevant when determining whether an individual is protected by discrimination law.

Background

The Equality Act 2010 protects workers and employees who have been discriminated against at work. It also protects individuals 'employed' under a 'contract personally to do work'. In some circumstances, this definition may catch a self-employed individual where they are obliged to do the work personally themselves. The definition can (in certain cases) therefore be wider than the test for employment status under UK employment law in relation to rights granted by the Employment Rights Act 1996, such as protection from unfair dismissal. In relation to those rights, a key component of employment status is whether the employer and employee have 'mutuality of obligation'. That is to say, whether the employer is obliged to provide work and whether the individual is also obliged to accept that work.

The European Court of Justice decision in the equal pay case of Allonby – v – Accrington and Rossendale College(Case C-256/01) distinguishes individuals who are independent providers of services (who are not protected by equal pay law) from individuals who are in a relationship of subordination (who are). In Jivraj – v – Hashwani [2011] IRLR 827, the Supreme Court considered whether or not an arbitrator was an 'employee' for the purposes of discrimination law. It held that it was not enough that the putative employee should be a party to a contract personally to do work: he or she must be 'employed under' such a contract for the test to be met. Other UK case law says that an individual is protected if the dominant purpose of the contract is to execute work personally, but that this is not the only factor.

Facts

Dr Windle and Mr Arada were professional interpreters on the National Register of Public Service Interpreters. They worked for many organisations, including HM Courts & Tribunals Service (HMCTS). They worked for HMCTS on a case-by-case basis. HMCTS was under no obligation to offer them work and they were under no obligation to accept offered work. They were paid only for work done, with no provision for holiday pay, sick pay or pension. They considered themselves self-employed and were taxed on that basis. They brought race discrimination claims against the Secretary of State for Justice. An employment tribunal had to decide a preliminary issue: whether they were employees under the extended definition in the Equality Act 2010, which would entitle them to claim discrimination. The central question was whether they were engaged under a 'contract personally to do work'.

The employment tribunal dismissed the claims and held that neither claimant was an employee. The individuals entered into contracts with HMCTS each time they accepted an assignment. However, there was no contractual relationship in between those engagements, because HMCTS was not obliged to offer them work, nor were they obliged to accept work

that was offered. In this way, there was no mutuality of obligations and no 'umbrella' contract between assignments. This suggested a lack of subordination to HMCTS. The tribunal therefore concluded that they were self-employed contractors, not employees. It applied the Court of Appeal's judgment in Quashie – v – Stringfellows Restaurants Ltd [2012] EWCA Civ 1735. In that case, the court considered whether the claimant was an employee and whether she could rely on an 'umbrella' contract to show that she had sufficient continuous employment to bring an unfair dismissal claim. The Court of Appeal stated that the fact that somebody works only intermittently could well point to them being self-employed, rather than an employee.

The Employment Appeal Tribunal (EAT) overturned the employment tribunal's decision. The claimants successfully argued that the tribunal erred by taking into account the lack of mutual obligations between assignments. The EAT said that Quashie was not relevant because it was an unfair dismissal case and did not deal with employment status under discrimination law.

The Secretary of State for Justice appealed to the Court of Appeal. The issue before the court was: was the EAT wrong to find that the tribunal misdirected itself by treating the absence of an 'umbrella' contract as a relevant factor when assessing employment status? The claimants argued that the question to ask is to what extent were they acting under the Secretary of State's direction while they were actually working. They argued that the absence of mutual obligations between assignments was not relevant to that question.

Judgment

The Court of Appeal allowed the appeal. The tribunal had been entitled to find that the claimants were not employees under the Equality Act 2010 definition.

The Court rejected the claimants' main argument that the lack of mutuality of obligation between engagements was irrelevant. It accepted that a tribunal should clearly look at the working relationship during the actual periods of work. However, it did not follow that the absence of mutual obligations outside of those periods did not shed light on the character of the relationship during those periods. The court said that it was a matter of common sense that the fact that an individual supplies their services only on a case-by-case basis may tend to indicate a degree of independence or lack of subordination while at work. That will not always be the case, but it will depend on the facts and should still be considered.

The Court of Appeal said that its conclusion would be the same even without reference to Quashie. The court stated that the ruling in Quashie that "the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather

than as an employee" cannot be disregarded on the basis that it dealt with employment under a contract of employment in an unfair dismissal context. The underlying point is the same. The factors in assessing whether a claimant is employed under a contract of employment are not essentially different from those when assessing whether he or she is an employee in the 'extended' sense under discrimination law. When considering the latter question, the boundary is pushed further in the putative employee's favour.

The claimants had argued that it was wrong to deny protection to an individual who would otherwise qualify as an employee during a particular assignment, just because there was no 'umbrella' contract between assignments. They also argued that it would be wrong if two people in substantially the same position did not enjoy the same protection simply because one works on a casual basis and the other does not. The Court of Appeal said that these submissions were not well founded. It held that the absence of an 'umbrella' contract is relevant only if it adds something to the conclusion that the claimant was not in a subordinate relationship. In that case, the individual is not in the same position as their comparator. Whether that is so would depend on the circumstances.

Commentary

The Court of Appeal's decision confirms that factors that are relevant to determining employment status under the Employment Rights Act 1996 are similarly relevant to employment status under the Equality Act 2010. The decision potentially makes it harder for an individual engaged on an assignment-by-assignment basis to prove that they are employed under a 'contract personally to do work' and thereby qualify for protection against discrimination. The existence (or lack of) mutual obligations between assignments can be a relevant consideration. This is a helpful ruling for companies that engage staff on casual contracts, such as so-called 'zero-hours contracts'.

Subject: Discrimination; employment status

Parties: Secretary of State for Justice – v – Windle & Arada

Court: Court of Appeal

Date: 12 May 2016

Case number: [2016] EWCA Civ 459

Creator: Court of Appeal
Verdict at: 2016-05-12

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